CHIAM YAH KIAM

v.

ABDUL MALIK ZAKARIA & ANOR & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN ZAKARIA JCA
[CIVIL SUIT NO: S3-22-121-1997]
2 NOVEMBER 2004

CIVIL PROCEDURE: *Summary possession of land - Application for vacant possession of property by plaintiff - Whether plaintiff a bona fide purchaser - Whether sale of property to plaintiff tainted with fraud - Whether plaintiff had an indefeasible title*

LAND LAW: *Indefeasibility of title and interests - Registered owner - Application for vacant possession of property by plaintiff - Whether plaintiff a bona fide purchaser - Whether sale of property to plaintiff tainted with fraud - Whether plaintiff had an indefeasible title*

The plaintiff, the registered proprietor of a certain plot of land with a double-storey house erected thereon ('the said premises'), commenced this action for vacant possession against the 1st defendant, Abdul Malik Zakaria ('AMZ'), an undischarged bankrupt, and all persons residing in the said premises ('the main action'). Although AMZ did not file an appearance or a defence, his wife Norlin Moin ('NM') filed a defence and a counterclaim against the plaintiff in the main action, and against the 2nd defendant in the counterclaim, one Harpal Singh Grewal ('HSG'). The plaintiff alleged that he had purchased the said premises from HSG, the previous registered owner, for the sum of RM285,000, and having registered himself as the new owner, had served a notice for vacant possession against the defendants in the main action. NM, however, contended that HSG was her agent/trustee in relation to the said premises and the plaintiff was HSG's nominee, and that the sale by HSG to the plaintiff was a mere fraud designed to defeat her claim to the said premises.

Held (allowing the plaintiff's action):

[1] Having considered the testimonies of the plaintiff and the plaintiff's witnesses, it was clear that the sale transaction between the plaintiff and HSG was a genuine sale transaction. There was sufficient evidence adduced by the plaintiff to show that payments were made partly to HSG and the balance RM185,000 was paid to Malayan Banking Bhd by way of redemption. This transaction between the plaintiff and HSG was

conducted through a firm of solicitors and a private caveat was entered on the property to protect his interest. The plaintiff was no doubt aware of the presence of an occupier or occupiers on the said premises and for that reason a clause was inserted that the vendor (HSG) was to deliver vacant possession within four months of the plaintiff paying off Malayan Banking Bhd the redemption sum, and in the event HSG failed to do so, he was to compensate the plaintiff RM3,000 per month until the date of delivery of vacant possession. The evidence showed that the plaintiff had the means to purchase the said premises and, contrary to NM's contention, there was not a shred of evidence that showed that the plaintiff had acted in consort with HSG to defraud NM. (p 542 a-d)

[1a] On the whole, both NM and AMZ were not truthful witnesses and there was no credible evidence to support AMZ's claim that the said premises was bought by HSG at a public auction as an agent/trustee of NM. NM's counterclaim against the plaintiff and HSG had to be dismissed with costs; thus, NM had no legal or equitable interest in the said premises. On the facts, the plaintiff was a *bona fide* purchaser for value of the said premises and, therefore, had an indefeasible title to the said premises. (p 545 a-c)

For the plaintiff - David Hoh; M/s Lee & May
For the defendants - MS Murthi; M/s Murthi & Partners
For the 2nd defendant (counter claim) - Jasvinjit Singh; M/s AJ Arifin, Yeo & Harpal

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria JCA:

The plaintiff is the registered proprietor of land held under Geran No. 14130, Lot No. 41202, Mukim Kuala Lumpur, Daerah Wilayah Persekutuan together with a double storey terrace house erected thereon having address No. 359, Lorong Maarof, Taman Bukit Bandaraya, 59000 Kuala Lumpur ("the said premises"). The plaintiff commenced this action ("the main action") for vacant possession against the 1st defendant, Abdul Malik bin Zakaria ("AMZ") who is an undischarged bankrupt and all persons residing in the said premises. AMZ did not file an appearance or a defence. However, his wife Norlin binti Moin ("NM") filed a defence in the main action and counter claim against the plaintiff in the main action and against one Harpal Singh Grewal ("HSG"), the 2nd defendant in the counter claim.

The Plaintiff's Case

The plaintiff alleged that he purchased the said premises from HSG the previous registered owner for the sum of RM285,000. HSG undertook to deliver vacant possession of the said premises within three months from the date of agreement ie, 26 January 1994. As it turned out HSG was facing problems in delivering vacant possession of the said premises and because of that it was mutually agreed between the parties that the agreement dated 26 January 1994 be revoked and substituted with a new agreement. Among the terms of the new agreement was that HSG undertakes to deliver vacant possession of the said premises within six months from the date the redemption sum is paid to HSG's bank and in the event he failed to do the same HSG undertakes to pay the plaintiff the sum of RM3,000 per month until vacant possession is delivered to the plaintiff.

The plaintiff contends that the sale transaction between him and HSG was done at arms length. The plaintiff claims that the redemption sum of RM185,000 was paid to Malayan Banking Bhd. and this was confirmed by the PW2, the branch manager of the bank. This leaves the final sum of RM45,000, after deducting the sum agreed under cl. 6 of the 2nd agreement. Having registered himself as the owner of the said premises a notice for vacant possession was served on the defendants in the main action. The defendants in the main action failed to deliver vacant possession of the said premises and hence this action.

As stated earlier AMZ did not file any appearance nor defence against the plaintiff's claim, but the plaintiff did not apply for a default judgment against AMZ, as the plaintiff ought to have done. The plaintiff however, prays for judgment to be entered against AMZ on the ground that since AMZ failed to deliver his defence, therefore, he is deemed to have admitted the plaintiff's claim. In the circumstance of this case, I agree with the plaintiff, that judgment on the merit ought to be entered against AMZ, and I so ordered. This does not, however, dispose of the matter in view of the defence and counter claim filed by NM.

NM's Defence And Counter Claim

A defence and counter claim was filed by NM. Her defence in essence is that HSG was her agent/trustee in relation to the said premises and the plaintiff was HSG's nominee and the sale by HSG to the plaintiff was a mere fraud designed to defeat her claim to the said premises.

NM's evidence in chief was by way of a witness statement marked "DW5-KS". It comprises of 10 questions and answers. Her testimony in essense is that she had given all powers to deal with the said premises to her husband, AMZ. In the cross examinations by both learned counsel for the plaintiff and HSG, NM admitted that her knowledge of the transaction involving the said premises was wholly derived from AMZ.

In answer to the question whether she had appointed AMZ as her agent for the purpose of purchasing the said premises she replied in the negative, but she went on to say that she did give AMZ her consent and authority to use her name for the purpose of any business dealing. Even when asked whether she knew anything about the counter claim she openly admitted that she knew nothing about it. When put to her that she did not have the sum of RM252,000 to bid for the said premises at the public auction she replied that she did not know anything about it as everything was done by AMZ. It is her pleaded case that she had appointed HSG as her agent/nominee but in her evidence she merely stated that she gave all powers "yang tidak terhad" to AMZ. In her evidence she did not claim that she had appointed HSG to be her agent/trustee. Therefore, the appointment of HSG as her agent/trustee for the purchase of the said premises if any must have done through AMZ.

Therefore, the strength of the NM's case would depend largely if not wholly on the testimony of AMZ. I shall now turn to consider AMZ's evidence.

AMZ's Evidence

In his evidence in chief, which was given by way of witness statement, AMZ stated that he is presently residing at the said premises together with his wife, NM, and their children. According to him, he bought the said premises some time in 1981, and to finance the purchase of the said premises he took a loan from the United Asian Bank. In 1984, he was declared a bankrupt and as a result, the said premises was transmitted to the Pegawai Pemegang Harta, Malaysia. The said premises came up for auction on 11 March 1991, at the Kuala Lumpur, High Court. The reserve price for the said premises was RM245,000. According to him, NM wanted to save the said premises and instructed him to bid for the same. To finance the purchase he said NM intended to utilize the sum of RM130,000 already paid to Messrs. A.J. Ariffin Chong & Harpal before the date of public auction date and the balance will be paid within 90 days of the public auction. He claimed the full sum was paid within the 90 day period. From his testimony a total sum of RM252,000 was paid to Messrs. A.J. Ariffin Chong & Harpal out of which RM246,000 was towards the puchase price and the balance RM6,200 was for solicitors' fees, disbursment and stamping fees.

After full payment of the purchase price HSG failed to deliver the title to the said premises to NM. He found out later that the said premises was registered in the name of HSG. This was done without the consent NM. Further, without the consent of NM, on 3 November 1992 the said premises was charged to Malayan Banking Bhd. He only came to know about the transfer of the said premises to HSG and the charge to Malayan Banking Bhd. some time in 1995 when he was served with Summons No. S3-24-748-95. This summons was later struck out. To support his story AMZ further stated, since 1991, the date of auction, HSG had not demanded for vacant possession or rental for the said premises.

HSG's Evidence

His evidence in chief is found in the witness statement marked "DW6-KS". He stated that he is an advocate and solicitor practicing under the name of Messrs. A.J. Ariffin, Yeo & Harpal Advocates and Solicitors. He is a senior partner of the firm.

He said he came to know AMZ since 1985 and over the years they became good friends. In the mid eighties, HSG said he had invested large sums of money in a large motor workshop in Subang Jaya and as he was busy with his legal practice he requested AMZ to oversee the operations. AMZ also had assisted him in his other business ventures such as sale and purchase of properties and dealing in second hand motorcars and lorries. Out of these, he said, AMZ had benefited financially.

With regard to the said premises he said he was first informed about the auction by AMZ in early March 1991 and AMZ requested him to buy the same in order to save his parents and siblings from being evicted from the said premises. AMZ agreed to pay the rental of RM3,000 per month for the said premises. On that promise he then decided to purchase the said premises. He said AMZ went along with him to the auction. He paid RM245,000 for the said premises. He denied that either he or his firm ever received any instruction in writing from NM to act as her agent or trustee. By June 1991 he said his relationship with AMZ had turned sour because of unauthorized withdrawal of some RM40,000 from his bank account by AMZ. After that incident he had disassociated himself from AMZ. As for the said premises he said AMZ did not pay any rental despite so many promises made and eventually he decided to sell off the said premises. It was sold to the plaintiff for the sum of RM285,000. He had to give the plaintiff a discount of RM26,000 to compensate the plaintiff for being unable to obtain vacant possession of the said premises. He denied the allegation by NM that the sale to the plaintiff was intended to defeat the claim by NM to the said premises.

Evaluation Of Evidence

Having considered the testimonies of the plaintiff and the plaintiff's witnesses I am convinced that the sale transaction between the plaintiff and HSG was a genuine sale transaction. There was sufficient evidence adduced by the plaintiff to show that payments were made partly to HSG and the balance RM185,000 was paid to Malayan Banking Bhd. by way of redemption. This payment to Malayan Banking Bhd. was made through his Hong Leong Bank cheque No. 531785 dated 3 October 1994. It should also be noted that this transaction between the plaintiff and HSG was conducted through a firm of solicitors Messrs. Koh Kim Leng & Co. and a private caveat was entered on the property on 25 October 1994 to protect his interest. No doubt that the plaintiff was aware of the presence of occupier or occupiers on the said premises and for that reason a clause was inserted that the vendor (HSG) is to deliver vacant possession within four months of the plaintiff paying off Malayan Banking Bhd. the redemption sum and in the event HSG fails to do so, he is to compensate the plaintiff RM3,000 per month until the date of delivery of vacant possession. From the evidence before me I am also convinced that the plaintiff has the means to purchase the said premises. This is evident by the "borang J" of the Jabatan Hasil Dalam Negeri for years of assessment 1994, 1995 and 1996 found at pp. 61, 62 & 63 of the agreed bundle. Contrary to NM's contention I find not a shred of evidence which shows that the plaintiff had acted in consort with HSG to defraud NM.

As against that we only have the evidence of AMZ to support NM's claim. NM herself in her evidence admitted that she had not given any instruction to HSG to act as her agent/trustee. Everything was done by AMZ. There is no evidence even to show that AMZ had discussed the matter with NM before he gave the alleged instruction to HSG to act as NM's agent/trustee. In cross-examination he admitted he instructed HSG using his wife's name. In those circumstances, considering his evidence and that of NM one can't help thinking that the whole story about NM wanting to save their matrimorial home by using HSG as her agent to bid for the said premises at the auction is nothing more than the story which was hatched out by AMZ after he was served with the summons.

One other glaring fact against NM in this case is the absence of any receipt for the payments allegedly made to the Messrs. A.J. Ariffin, Chong & Harpal. Even if NM is an ignorant housewife, as AMZ wants the court to believe, AMZ is far from being ignorant. He was a close friend of Harpal and had some accounting background. I am sure he would have asked for receipt for all the payments that he had allegedly made on behalf of NM. Not a single receipt was tendered in court. I believe there was none; otherwise, AMZ would

have produced the same. The amount of money involved is not small and I am sure if the money was actually paid to Messrs. A.J. Ariffin Chong & Harpal for the said purpose, AMZ would have asked for the receipt, no matter how much he trusted HSG, because here he was dealing with solicitors' firm and not with HSG personally. In all likelihood I think those payments were made for something else as contended by HSG.

The other point that is against NM's claim is the manner in which the payment was made to the A.J. Ariffin Chong & Harpal. It is NM's case that the sum RM130,800 was paid in four instalments to the said firm well before the auction date. The first instalment of RM40,000 was made as early as 17 July 1990. The second payment was made on 19 July 1990, the third payment on 29 September 1990 and the fourth payment on 5 January 1991. Firstly, the question is what is the need of making these payments so early in the day when the auction was coming up on 11 March 1991. Secondly, why pay so much, when normally you only need to pay a deposit of 10% of the purchase price. In his testimony AMZ sought to explain this as follows:

a. My wife intended to rescue the said premises.

b. Mr. Harpal Singh Grewal (as in the 2nd Defendant in the counter claim) has told me that he would arrange for a loan with Citibank. He has contacts. He would be able to arrange 70% loan. I was advised by Mr. Harpal Singh Grewal to deposit 30% of the value of the property which was then RM260,000 into the client's account together with RM10,800.00 for legal fees and other expenses. He said he could give any undertaking to the lending Bank if it becomes necessary. I then obtained two cheques from my wife for RM88,800.00 and gave it to our lawyers. RM78,000.00 was for 30% margin and a further sum of RM10,800 for legal fees, stamp duty and other expenses. Sometime in September, I was told that my wife loan application was not successful. Mr. Harpal Singh Grewal then told me that we could try again with Maybank but for a lower margin. My wife then gave two more cheques for the sum of RM24,000.00 and RM18,000.00. We had by then deposited a total sum of RM130,800.00 which is 50% of the forced sale value of RM240,000.00 i.e. RM120,000.00 plus RM10,800 for legal fees and other expenses.

Having heard his explanation I am far from convinced. This is nothing more than a feeble attempt by AMZ to explain away why those payments were made well in advance of the auction date. For he very well knew that it is illogical for someone to pay for the auction well in advance of the auction date. Further, even if we were to accept his explanation about getting a loan from a bank to finance the purchase, the question is why should the money be paid into the solicitors' account and not deposited with the bank to show his or her

financial standing. Further when questioned about the two cash cheques D8 and D17 for RM24,000 and RM18,000 respectively, to whom they were paid, his answer was to HSG. He said he cashed the two cheques and gave the money to HSG who was waiting outside the bank. The question is were these sums really paid to HSG, which was denied by HSG, and even if it was paid to HSG were they really meant for payment towards the purchase of the said premises. Logically if these sums were meant for the purchase of the said premises why can't the cheque be drawn in favour of the solicitors' firm as was done in the past or credited into the firm's account. In this regard I am of the view that the way these payments were made and the dates on which these payments were made are more consistent with HSG's contention that these payments had nothing to do with the purchase of the said premises by NM. These payments according to him were payments for his share of profits from a company called Heritage Networks (M) Sdn. Bhd., which was paid through a company called Sysplan (M) Sdn. Bhd. ("Sysplan"). These payments were made to Messrs. A.J. Ariffin, Chong & Harpal client's account. Further he stated he never received the sum of RM130,000 as stated in para. 62 of the counter claim. He said he only received the sums of RM40,000 and RM48,000. Therefore, the total amount received by him through Sysplan is RM209,400 not RM252,200 as stated by AMZ. It is not denied by HSG that these payments were made to Messrs. A.J. Ariffin Chong & Harpal from a company called Sysplan (M) Sdn. Bhd. but these payments were for purposes other than the purchase of the said premises. Further the total amount paid to A.J. Ariffin Chong & Harpal fell short of the price of the said premises. To make up for the shortfall, AMZ had to use the 2 cash cheques for the sums of RM24,000 and RM18,000 which he cashed by himself. According to HSG he never received these sums from AMZ. As I said earlier if these sums were meant to be credited to the account of Messrs. A.J. Ariffin Chong & Harpal why were they not credited directly into the said account. In this regard I am more inclined to believe HSG that AMZ never paid HSG the said sums.

Another factor that goes against NM's claim is that these payments came for Sysplan not from NM herself. NM did not offer any explanation as to why Sysplan should be paying for the purchase of the said premises. Based on the payments made, I am of the view that if at all any body should be claiming the said premises rightly it should be Sysplan not NM. Apart from the fact that NM signed the cheque for Sysplan as director of the company we do not know what interest, if any, she has in the company.

On the whole I find both NM and AMZ are not witnesses of truth. To me AMZ had fabricated the story that the said premises was bought by HSG at the auction as agent/trustee of NM. There is no credible evidence to support this claim. In the result NM's counter claim against the plaintiff and HSG is dismissed with costs.

Claim By The Plaintiff

In view of my finding above it follows that NM has no legal or equitable interest in the said premises. On the evidence before me, I find the plaintiff is a *bona fide* purchaser for value of the said premises, and, therefore, he has an indefeasible title to the said premises. For the above reasons I hold that the plaintiff is entitled to the orders as prayed in paras. 8(i) and (ii) of his claim.